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In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

WCC Associates, Birtcher/BCI, *Petitioners*

v.

Hawaii Carpenters Trust Funds; United Brotherhood of Carpenters and Joiners of America, Local 745, AFL-CIO, *Respondents*.

On Petition for a Writ of Certiorari
to the Supreme Court of Hawaii

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, preempts the use of a state mechanic's lien statutes to recover unpaid ERISA trust fund contributions where there is no pre-existing judgment and where liability to make those contributions is dependent on interpretation of ERISA provisions related to a collective bargaining agreement?

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INTRODUCTION

Respondents' Brief in Opposition to Petition For A Writ of Certiorari filed May 28, 1997 (hereinafter "RB") fails to note that the issue here is the conflict regarding imposition of liability under the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, as distinguished from Hawaii`s state mechanic's lien statute, and not the mere enforcement of pre-existing judgments. Allowing Respondents to proceed under Hawaii's mechanic's lien statute would impose liability on Petitioners which the Ninth Circuit has expressly held would not be imposed under ERISA. *See Carpenters Pension Trust for Northern California v. Underground Construction Company, Inc.*, 31 F.3d 776, 779-780 (9th Cir. 1994). This would defeat

Congress' intent to develop a uniform body of Federal common law governing pension plans.

REASONS FOR GRANTING THE PETITION

Respondents obtained judgments *only* against subcontractors BCI and Yost, not against Petitioners. Respondents argue that Petitioners failed to submit any admissible evidence in the state circuit court regarding the existence or non-existence of a judgment. *See* RB, pp. 4-5. But because the Hawaii state circuit court dismissed the original proceeding based on ERISA preemption before a probable cause hearing was held on the issue of whether Respondents could file mechanic's liens, there cannot yet be any judgments; the cases have not progressed that far. Further, Petitioners should not be forced to go through with a probable cause hearing if this area is preempted by ERISA. Preemption should be determined at the outset to prevent needless litigation in state court.

Since Respondents do not have a judgment against Petitioners, they cannot be said to be merely enforcing a judgment. And Petitioner Birtcher/BCI cannot be held responsible for the debts of BCI and Yost. Under the very collective bargaining agreements ("CBAs") relied upon by Respondents, Petitioner Birtcher/BCI is only responsible for the pension fund contributions of their employees, not the employees of BCI and Yost. The CBAs were signed by BCI and Yost in their individual capacities, not as said Petitioner's representatives.[1] The joint venture agreement which created

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[1] Respondents' argument that the CBAs should be stricken from the record below is misplaced. *See* RB, p. 3. Since the Hawaii Supreme Court did not rule on objections made to Petitioners' introduction of the copy of the CBA, that evidence remains in the record and can be considered.

Petitioner Birtcher/BCI contains no express assumption by either joint venturer of primary or default responsibility for contributions so as to establish liability under ERISA. To the contrary, the joint venture agreement expressly prohibited the Joint Venturers from assuming such obligations without approval by the joint venture committee. Thus, Petitioners have no express liability for the disputed pension fund contributions under the CBAs.

The Ninth Circuit has expressly held that under ERISA, a joint venturer such as Petitioner Birtcher/BCI is not liable for its subcontractors' debts unless it is contractually bound to make pension contributions. *Carpenters Pension Trust for Northern California v. Underground Construction Company, Inc.*, 31 F.3d 776, 779-780 (9th Cir. 1994). The Eighth Circuit reached a similar conclusion, after surveying decisions from other circuits, in *Seaway Port Authority v. Duluth-Superior ILA Marine Association*, 920 F.2d 503, 509 (8th Cir. 1990), *cert. denied*, 501 U.S. 1218 (1991) ("one fact common to all of the parties held subject to withdrawal liability: *they were contractually bound to make pension contributions* . . ." [emphasis in original]). Further, as the Ninth Circuit held in *Underground Construction, supra*, if ERISA provisions "... provide an avenue of escape from . . . liability where a contractor adopts the JV [joint venture] approach as a general practice, only Congress can close this gap." 31 F.3d at 779. Petitioners' case demonstrates how, absent a clear ruling on preemption by this Court, parties such as Respondents can continue to use state court proceedings to thwart Congressional intent.

Under the Ninth Circuit's interpretation of ERISA provisions, which the United States District Court for the District of Hawaii must follow and the Hawaii state court should follow, Petitioners are not liable for the disputed

pension fund contributions. Here, Respondents have attempted to manufacture liability in the Hawaii state courts by using Hawaii's mechanic's lien statutes where the parties expressly contracted to avoid such liability through the use of a joint venture arrangement. Respondents' actions are inconsistent with Congress' intent to create uniform federal regulation of pension plans.

This Court has expressly stated that Congress intended to preempt state law and "establish pension plan regulation as exclusively a federal concern." *Pilot Life Insurance Company v. Dedeaux*, 481 U.S. 41, 45-46, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987). In *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990), this Court found that in passing ERISA Section 514(a) [29 U.S.C. § 1144(a)], Congress intended

> to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or *between States and the Federal Government* ..., [and to prevent] the potential for conflict in substantive law ... requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.

498 U.S. at 142 [emphasis added].

In *California Division of Labor Standards Enforcement, et al. v. Dillingham Construction, N.A., Inc.*, ___ U.S. ___, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997), this Court noted that

> [T]o determine whether a state law has the forbidden connection [with ERISA], we look both to "the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive," ibid., as well as to the nature of the effect of the state law on ERISA plans, id., [514 U.S.] at ----, 115 S.Ct., at 1677.

117 S.Ct. at 838.

Here, Congress' intent to ensure that plans and plan sponsors would be subject to a uniform body of benefits law is thwarted by the effect of Hawaii's mechanic's lien law on ERISA plans. Hawaii's mechanic's lien law is being used by Respondents to impose liability for pension fund contributions which does not exist under ERISA. Thus, the "forbidden connection" defined in *Dillingham, supra*, exists between ERISA and Hawaii's mechanic's lien law as applied by Respondents.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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